No. 82-1724

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

STATE OF NEW YORK,

Petitioner,

v.

ROBERT UPLINGER, SUSAN BUTLER,

Respondents.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NEW YORK

# MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. ON BEHALF OF RESPONDENT UPLINGER

December 17, 1983

Mary C. Dunlap
Abby R. Rubenfeld
(Counsel of Record)
Attorneys for Amicus Curiae
LAMBDA LEGAL DEFENSE &
EDUCATION FUND, INC.
132 West 43rd Street
New York, New York 10036
(212) 944-9488

Of Counsel:
Nan D. Hunter

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In The

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October Term, 1983

State of New York,

Petitioner,

v.

Robert Uplinger, Susan Butler,

Respondents.

On Writ of Certiorari to the New York Court of Appeals

Motion of Lambda Legal Defense & Education Fund, Inc. for Leave to File Brief as Amicus Curiae on Behalf of Respondent Uplinger

Pursuant to Rule 36.3 of the Rules of the Supreme Court of the United States, Lambda Legal Defense & Education Fund, Inc. respectfully moves for leave to file the attached amicus curiae brief on behalf of the Respondent Uplinger in

the above-captioned case. The Respondents, but not the Petitioner, have consented to the filing of this brief.

Lambda Legal Defense & Education Fund, Inc. (hereinafter referred to as "LLDEF") is a New York not-for-profit corporation, authorized to practice law in the State of New York. It is the oldest and largest national gay and lesbian public interest law firm, having been organized in 1973 "to seek, through the legal process, to insure equal protection of the laws and the protection of civil rights of homosexuals" and in furtherance of that purpose, "to initiate or join in judicial and administrative proceedings whenever legal rights and interests of significant numbers of homosexuals may be affected." LLDEF Certificate of Incorporation ¶ 2.2(a). LLDEF is recognized as a

tax-exempt organization by the United States Internal Revenue Service.

Over the past ten years, LLDEF has participated as an amicus in several major constitutional challenges to statutes which restrict or prohibit the private, consensual sexual conduct of homosexuals. LLDEF has recently submitted amicus briefs to United States Courts of Appeal for both the Fifth and Eleventh Circuits in cases which involve constitutional challenges to state sodomy laws: Baker v. Wade, 553 F. Supp. 1121 (N.D.Tex. 1982), (appeal filed, October 28, 1982, 5th Cir. No. 82-1590); Hardwick et al. v. Bowers et al., (11th Cir., No. 83-8378, Filed May 19, 1983) (N.D.Ga., Civil Action No. C83-273A, dismissed April 18, 1983). LLDEF filed an amicus brief on behalf of the Respondent Uplinger before the New

York Court of Appeals, and also submitted an amicus brief to that Court in the case of People v. Onofre, 51 N.Y.2d 476 (1980), cert. denied, 451 U.S. 987 (1981), wherein the New York sodomy statute was declared unconstitutional.

LLDEF has a special interest in participating in challenges to statutes which prohibit or restrict consensual, adult sexual activity because such laws have an especially adverse impact on homosexuals. Evidence indicates that such laws have a substantial deleterious effect on the lives and mental health of gay men and lesbians. National Institute of Mental Health, Final Report of the Task Force on Homosexuality 6 (1972). The statute challenged herein, Penal Law § 240.35(3), clearly affects homosexuals more than any other group because it

prohibits solicitation in public places of so-called "deviate sexual intercourse or other sexual behavior of a deviate nature." As "deviate sexual intercourse" is defined in Penal Law § 130.00(2), the statute effectively prohibits all homosexual requests in public places for sexual intimacy, while still allowing requests for the form of sexual intimacy that is primary for heterosexuals. In addition, as the trial court noted, until the Onofre decision, when Buffalo police began using the statute against prostitutes, the law was enforced in Buffalo almost exclusively against homosexuals. People v. Uplinger, 444 N.Y.S.2d 373, 374 (City Ct. 1981).

Participation in challenges to laws such as this one constitutes the very reason for the existence of LLDEF.

As an organization dedicated to challenging laws such as Penal Law § 240.35(3) which have an adverse impact on homosexuals, LLDEF has developed an understanding of how these laws affect gay men and lesbians in the exercise of their fundamental rights. LLDEF is thus in the best position to assert the broad interest of the group that is most severely affected by this statute. Since the instant action involves a facial challenge to the constitutionality of this statute, it is important that the group interests of gay men and lesbians be adequately considered in addition to the specific interests of the parties. LLDEF is most capable of providing this special assistance.

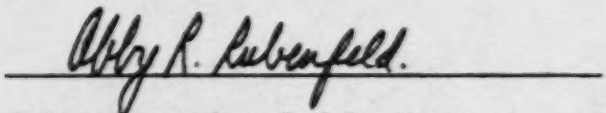
The LLDEF brief attached hereto addresses the anti-homosexual animus underlying the purpose and

enforcement of Penal Law § 240.35(3) and how the constitutional right of privacy encompasses the Respondent Uplinger's expression of sexuality, both of which issues are not discussed in the brief of that Respondent. In addition, the LLDEF brief expands on the equal protection argument raised by counsel for the Respondent Uplinger in arguing that there is no rational basis for the statutory distinction between solicitations for "deviate" and "non-deviate" sexual conduct.

In order to supplement the arguments of counsel for the Respondents and to present the perspective of the group of individuals most severely affected by the challenged statute, Lambda Legal Defense & Education Fund, Inc. respectfully moves for leave to

file the attached brief as an amicus curiae on behalf of the Respondent Uplinger.

Respectfully submitted,



Abby R. Rubenfeld, Esq.
(Counsel of Record)
Managing Attorney
Lambda Legal Defense &
Education Fund, Inc.
132 West 43rd Street
New York, New York 10036
(212) 944-9488

November 17, 1983

No. 82-1724

IN THE

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October Term 1983

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER, SUSAN BUTLER

Respondents.

On Writ of Certiorari to the
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# BRIEF AMICUS CURIAE OF LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC. ON BEHALF OF RESPONDENT UPLINGER

Mary C. Dunlap
Abby R. Rubenfeld
(Counsel of Record)
Attorneys for Amicus Curiae
LAMBDA LEGAL DEFENSE &
EDUCATION FUND, INC.
132 West 43rd Street
New York, New York 10036
(212) 944-9488

Of Counsel:
Nan D. Hunter

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## INTEREST OF AMICUS CURIAE

Lambda Legal Defense & Education Fund, Inc., (hereinafter referred to as "LLDEF") is a New York not-for-profit corporation, authorized to practice law in the State of New York. LLDEF is the oldest and largest national gay public interest law firm, having been formed in 1973 "to seek, through the legal process, to insure equal protection of the laws and the protection of civil rights of homosexuals" and in furtherance of that purpose, "to initiate or join in judicial and administrative proceedings whenever legal rights and interests of significant numbers of homosexuals may be affected." LLDEF Certificate of Incorporation ¶ 2.2(a). The legitimacy of these goals as the basis for a not-for-profit corporation was recognized by the New

York Court of Appeals in In Re Thom, 33 N.Y.2d 609 (1973). LLDEF is recognized as a tax-exempt organization by the United States Internal Revenue Service.

LLDEF has a special interest in participating in such cases as the instant one in which discreet conduct by gay men or lesbians is made subject to the penalty of criminal law. Millions of adults in the United States have engaged in sexual contact with persons of the same gender. Bell and Weinberg, Homosexualities: A Study of Diversity Among Men and Women (1978); Kinsey et al., Sexual Behavior in the Human Male 638-641 (Philadelphia 1948); Kinsey et al., Sexual Behavior in the Human Female (Philadelphia 1953); Baker v. Wade, 553 F. Supp. 1121, 1129 (N.D. Tex. 1982) (appeal filed, Oct. 28, 1982, 5th Cir. No. 82-1590) (approximating the gay and

lesbian population of Texas to include 700,000 persons). These Americans have been subjected to irrational hatred and fear, known as homophobia, solely because of their sexual preference.

The arguments presented herein focus on the reasons why prosecutions directed explicitly against homosexuals under Penal Law § 240.35(3) are unconstitutional.

## SUMMARY OF ARGUMENT

The record in this case demonstrates a history of invidious discrimination against homosexuals in the enactment and enforcement of Penal Law § 240.35(3). The state legislature deliberately selected only those sexual acts which it defined as "deviate" to be the basis for prosecution for solicitation. Police officers testified at trial that enforcement of the statute

has been targeted almost exclusively against gay men. Such discrimination has profoundly damaging effects on gay men and lesbians, and forecloses a means of sexual expressiveness which is allowed and encouraged for heterosexuals.

Respondent Uplinger's expression of sexuality is constitutionally protected. The right to privacy encompasses sexual orientation and the choice of sexual partners. For gay men and lesbians, the connection between the personal autonomy guaranteed by the privacy right and the expression of sexuality is particularly important. The decision to "come out" publicly as a homosexual is a statement of great personal and political significance.

The self-identifying, public aspect of the choice to be homosexual or

heterosexual includes the initiation of sexual contact, in the quiet and unobtrusive manner of Respondent Uplinger. Penal Law § 240.35(3) creates an impermissible burden on privacy rights by prohibiting homosexuals from discreetly seeking willing sexual partners. Absent a compelling state interest, such a significant burden cannot be imposed on the fundamental rights of privacy and speech. None of the statutory justifications asserted by the Petitioner meets the compelling interest standard.

The challenged statute distinguishes between lawful and unlawful conduct based on the content of communication involved. It prohibits solicitations for "deviate" sexual acts but permits solicitations for "non-deviate" acts. The First Amendment and the Equal Protection Clause of the Fourteenth

Amendment require that content-based restriction on expression be strictly scrutinized. Petitioner attempts to justify this classification by claiming that solicitations for "deviate" sex are somehow more "offensive" than those made for "non-deviate" sex. Petitioner presumes that prejudice against gay male intercourse and against all oral-genital contact is so widespread that the law can freely discriminate. Such a circular rationale does not meet the exacting standards of strict scrutiny.

## I. ANTI-HOMOSEXUAL ANIMUS UNDERLIES THE PURPOSE AND ENFORCEMENT OF PENAL LAW § 240.35(3).

Prejudice against homosexuals permeates the record of this case. The history of Penal Law § 240.35(3) reveals that the state legislature amended the original version of the bill, which would have prohibited solicitations for

any kind of sexual activity, by narrowing the scope of the law to penalize only "deviate" acts. Pet. Brief at 27. In upholding Robert Uplinger's conviction, the County Court described his conduct as "a contemptuous disregard for community standards. . ." People v. Uplinger, 449 N.Y.S.2d 916, 920 (County Court, 1982).

Police officers testified at trial in this case that the enforcement of Penal Law § 240.35(3) is targeted against gay men (Joint Appendix at 61, 107) and admitted that its recent use in heterosexual prostitution cases was an effort to "get around" the decision by New York's highest court invalidating the consensual sodomy law. (J.A. 107). Until recent years, Buffalo police used the law as a basis for sending undercover officers into gay bars and arresting

the gay men who approached them there. (J.A. 75-76).

A hotel owner who testified for the prosecution, apparently to establish that gay men who frequented the vicinity of his hotel were a nuisance, said that he had "received no specific complaints," (J.A. 41); that the men "generally just stand there," (J.A. 42); that he had witnessed only one interaction between a man on the street and a passerby, (J.A. 42); that the men were "reasonably quiet," (J.A. 44); and that he had never seen any of them engage in violence or in imposing themselves on passers-by. (J.A. 46). What made them undesirable, he admitted, was that they were male and homosexual. (J.A. 46).

The harmful effects of such discrimination against gay men and

lesbians are profound. As the chief of the vice investigation bureau of the Buffalo Police Department acknowledged, "these cases can be very, very damaging to an individual's reputation in the community." (J.A. 26). More significant, the foreclosure of the means of sexual expressiveness which is allowed and often encouraged for heterosexuals carries with it the inescapable message to gay men and lesbians that they as persons are "deviate," "abnormal," and thus less worthy human beings. See Baker v. Wade, 553 F. Supp. at 1127-1128; G. Weinberg, Society and the Healthy Homosexual (1972); H.L.A. Hart, Law, Liberty and Morality, 22 (1965) (laws against consensual sexual relations between homosexuals inflict "a special form of punishment on those

whose desires are frustrated by fear of punishment").

## II. RESPONDENT UPLINGER'S EXPRESSION OF SEXUALITY IS PROTECTED WITHIN THE SCOPE OF THE FUNDAMENTAL CONSTITUTIONAL RIGHT OF PRIVACY.

The loitering statute at issue here has as its object "to punish conduct anticipatory to the act of consensual sodomy." People v. Uplinger, 58 N.Y.2d 936, 938 (1983). The underlying conduct in the Uplinger case, sexual activity between males, is constitutionally protected. People v. Onofre, 51 N.Y.2d 476 (1980), cert. denied 451 U.S. 987 (1980). A conversation which precedes this lawful conduct is both a critical component of homosexual self-identification and an expression of desire for intimate human contact.

Robert Uplinger's conviction was not based on any sexual act

prohibited in New York State.[1] The discussion between Uplinger and the undercover police agent "was just a brief conversation more or less to the extent of hello, how are you, that type of thing." (J.A. 104). It continued "back and forth" for ten to fifteen minutes before a sexual act was mentioned (J.A. 104, 127), and reflected nothing more than Uplinger's attempt to find a mutually interested sexual partner. There was no evidence of the sale of sexual acts; nor of forcible sex or an age discrepancy between the

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1. Petitioner argues that the element of commercial sex is present in the case of Respondent Butler, although she was not arrested or convicted based on that change. The statute at issue here is not directed at prostitution. The validity of the solicitation for prostitution statute, Penal Law § 230.00, is not under challenge in this case and is not before this Court.

partners indicative of an inherent power imbalance; nor of sex acts committed in public; nor even of a verbal imposition on an uninterested citizen.

Sexual orientation and the choice of sexual partners, like other intimate personal decisions, is safeguarded as part of the right of personal privacy. People v. Onofre, supra.[2] See L. Tribe, American Constitutional Law, at 941-948 (1978). The right of each

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2. The holding in Onofre was premised on the protection of the Equal Protection Clause as well as the privacy right. 51 N.Y.2d at 492. The correctness of the Onofre decision is not before the Court. If this Court should conclude that it wishes to address those major underlying constitutional questions, Amicus respectfully suggests that certiorari in the instant case be dismissed as improvidently granted to allow the issues to be more fully and carefully developed with greater clarity and precision in a future case. Rescue Army v. Municipal Court, 331 U.S. 549, 576 (1947). To adjudicate this case, the Court need only respect the fact that Onofre was, at the time Uplinger was prosecuted, the prevailing and applicable law of New York.

individual to exercise "independence in making certain kinds of important decisions," Whalen v. Roe, 429 U.S. 589, 599-600 (1977), has been developed almost entirely in the context of situations inextricably linked to sexuality, Griswold v. Connecticut, 381 U.S. 479 (1965); often outside marriage, Eisenstadt v. Baird, 405 U.S. 438 (1972); and invariably involving life choices which implicate one's most deeply held moral and ethical beliefs. Roe v. Wade, 410 U.S. 113 (1973). The choice to engage in homosexual activity is not unlike the decision whether to procreate. As this Court explained in Carey v. Population Services International, 431 U.S. 678, 685 (1977), "[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected

choices. . . in a field that by definition concerns the most intimate of human activities and relationships . . . ." "The most intimate of human activities and relationships" is, of course, sexuality.

> It is not marriage vows which make intimate and highly personal the sexual behavior of human beings. It is, instead, the nature of sexuality itself or something intensely private to the individual that calls forth constitutional protection.

Lovisi v. Slayton, 363 F. Supp. 620, 625 (E.D.Va. 1973), aff'd on other grounds 539 F.2d 349 (4th Cir. 1976), cert. denied 429 U.S. 977 (1976).

The expression of sexuality cannot be separated from the choice of sexual orientation. See Tribe, American Constitutional Law at 887-888. For gay men and lesbians, the connection between the personal autonomy guaranteed by the privacy right and the expression of

sexuality is particularly acute. "The decision to 'come out of the closet' and avow one's homosexual association is certainly a statement of great personal importance and may also be a political act." K. Karst, The Freedom of Intimate Association, 89 Yale L. J. 624, 654 (1980). See, Gay Law Students' Association v. Pacific Telephone & Telegraph Co., 24 Cal.3d 458, 595 P.2d 592, 156 Cal.Rptr.14 (1979). Cf., Note, on Privacy: Constitutional Protection for Personal Liberty, 48 N.Y.U.L. Rev. 670, 719-738 (1973). Yet it is often when homosexuals seek to assert their choice of sexuality in the most traditional ways that the opprobrium of the majority community is most intense. The courts have by necessity interceded on such occasions to protect the rights of the homosexual minority. In Gay Students

Organization v. Bonner, 509 F.2d 652 (1st Cir. 1974), university administrators unsuccessfully sought to justify a prohibition against gay social functions on campus in part by describing an earlier gay dance as a "spectacle". Id. at 661. Cf., Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980), in which a male high school student was granted an injunction to allow him to attend the senior class dance with a male date.

The self-identifying, public component of the choice to be homosexual or heterosexual includes the initiation of sexual contact. Penal Law § 240.35(3) creates an impermissible burden on the privacy right in prohibiting that option for homosexuals.[3] In

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3. The burden is magnified because, given the (Footnote Continued)

Carey v. Population Services International, supra, this Court struck down statutes limiting access to and advertising of contraceptive and abortion services. The Court reasoned that these restrictions burdened the right of privacy, which incorporates the right to use contraceptives and obtain abortions. A significant burden, especially one

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(Footnote Continued)
nature of anti-gay discrimination, homosexuals have been forced to rely on public places to meet each other. Other social settings, such as a work place, school or church, are largely unavailable to gay men and lesbians because of the enormous risk of openly acknowledging a minority sexual preference and the absence of legal protection from any ensuing discrimination. J. Bell, Public Manifestations of Personal Morality: Limitations on the Use of Solicitation Statutes to Control Homosexual Cruising, 5 J. of Homosexuality 97, 101 (1979). It has been found that the overwhelming majority of relationships which are verbally initiated in public places are expressed sexually in the privacy of one partner's home. Bell and Weinberg, Homosexualities, supra at 77, 305. Such was the intention of Robert Uplinger in this case.

which curtails constitutionally-protected speech, cannot be imposed on a fundamental privacy right absent a compelling interest.

> Appellants contend that advertisements of contraceptive products would be offensive and embarrassing to those exposed to them, and that permitting them would legitimize sexual activity of young people. But these are classically not justifications validating the suppression of expression protected by the First Amendment. At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify suppression. See e.g., Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).

Carey v. Population Services International, 431 U.S. at 701. Cf. Bolger v. Youngs Drugs Products, ____ U.S. ____, 51 U.S.L.W. 4961 (1983); Bigelow v. Virginia, 421 U.S. 809 (1975). The right to explore common sexual interests in conversation, to inquire quietly if a person is interested in sexual contact,

to be suggestive or responsive as the interaction continues and mutual interest becomes apparent -- these rights are no less protected than the right to advertise contraceptive products or abortion services.

Petitioner seeks to reverse the Court of Appeals' decision on the ground that "all such behavior, as long as it occurs in public, is a legitimate target of the statute." Pet. Brief at 24.[4] To justify the candid attempt at proscribing non-obscene speech in a public forum, petitioner repeatedly invokes its interest in preventing

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4. Penal Law § 240.35(3) is not limited, however, to the "streets", as the State expediently contends. Pet. Brief at 21. Until at least 1976 or 1977, the police used the same law to enter gay bars and arrest men inside for solicitation. (J.A. 75-76). Nothing in the language of the statute would prevent the State from reviving this practice.

harassment of citizens, solicitation of children, unavoidable affronts to passersby, and the degeneration of neighborhoods. Pet. Brief at 8, 9, 14, 15, 17, 18, 19, 20 and 29. Not one of these circumstances, however, was present in the facts adduced below as to Robert Uplinger's conduct. (J.A. 76-77, 103-105.) The acts for which Uplinger was convicted could have as easily occurred in his living room. Moreover, according to the testimony of a vice squad officer with 15 years experience, the inoffensiveness with which Uplinger approached the other man was typical of interactions between gay men on the street. (J.A. 65, 73.)

There is nothing inherently obtrusive about conversations that occur in public places. Private, discreet conversations frequently occur on public

streets, sidewalks, and in parks. A request for sexual intimacy during such a conversation is by no means necessarily annoying or indiscriminate. A study of nearly 1,000 homosexual men in San Francisco by the Kinsey Institute for Sex Research found that "public cruising [looking for a sexual partner] required much more discretion [than cruising in bars and baths], and a system of subtle cues helped cruisers identify each other." Bell and Weinberg, Homosexualities: A Study of Diversity Among Men and Women at 241 (1978).[5] A similar

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5. Far from the threatening, offensive scene described in Petitioner's Brief, the Kinsey report described a typical solicitation in a public place as follows:

> The cruising sequence usually began with a person positioning himself on a street or public area. When he spotted a potential sexual partner, the cruiser moved within

(Footnote Continued)

study found that "[s]olicitations are usually made by gesture and quiet conversation," and, as in the instant case, they are too discreet to be overheard by others. Project Report, The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles

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(Footnote Continued)

> range by driving, walking, or lingering near the person he was cruising. Sometimes this involved looking into the same store window or up at the same marquee or standing together at the same newsstand. Next he made some kind of contact (or waited for the prospective partner to do so). This might involve a smile, a stare, or a lingering eye contact, or it might be verbal: "Do you happen to have the time?" "That's a nice shirt in the window," or more personally, "That's a nice shirt you have on." If the other responded agreeably, the cruiser then suggested getting together in private: "Do you want to come to my place?" "Let's make love," or even, "What do you say we get some coffee?" Soon thereafter, the two would come to an agreement about what to do and where and would stroll (or drive) off together.

Bell and Weinberg, Homosexualities, at 242-43.

County, 13 U.C.L.A. L. Rev. 643, 695 (1966). The openness of such statements or requests has been found to vary "inversely with the publicness of the setting," and generally the communication is so subtle that only others who are mutually interested will understand. E. Delf, The Silent Community, 36, 19-28 (1978); Bell and Weinberg, supra at 230.

The involvement of the police in the investigation of private, consensual, noncommercial and non-violent adult sexual activity implicates as well this Court's expressed concern for establishing ethical and appropriate limits on governmental intrusiveness in personal sexual choices. See, e.g., Stanley v. Georgia, 394 U.S. 557 (1969); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479, 483 (1955). Police activity such as

that described in the record of this case (J.A. 25, 27-28, 63-66, 71-73, 75-76, 99) wastes the credibility and dignity of law enforcement personnel on matters of minimal if not prurient interest to the government. Kadish, The Crisis of Overcriminalization, 374 Annals 160-162 (Amer. Academy of Political and Social Science 1967); Project Report, supra. The fact that the subjects of the investigation at issue are primarily gay men does not minimize the corruption of the purposes of criminal law enforcement.

To fulfill a legitimate interest in maintaining public order, the government must rely on a more precise and narrowly-tailored statute. Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971); Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029, 1042

(5th Cir. 1980), rev'd on other grounds ____ U.S. ____ (1982). Two such laws, prohibiting disorderly conduct and harassment, already exist. Penal Law §§ 240.20 and 240.25. By contrast, the statute at issue here is "devoid of a requirement that the conduct prescribed be in any way offensive or annoying to others." People v. Uplinger, 58 N.Y.2d at 938. The government cannot arbitrarily banish sexual expression from public spaces simply because the speaker seeks an affirmative response to a minority sexual orientation.

## III. THE DISTINCTION IN PENAL LAW § 240.35(3) BETWEEN SOLICITING FOR SO-CALLED "DEVIATE" AS OPPOSED TO "NON-DEVIATE" SEXUAL CONDUCT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The challenged statute criminalizes speech by prohibiting

solicitations for "deviate" sexual acts but permitting solicitations for "non-deviate" acts. On its face, the statute differentiates between lawful and unlawful conduct based on the content of the communication involved.[6] The

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6. Penal Law § 240.35(3) also violates the equal protection guarantee of the Fourteenth Amendment by discriminating on the basis of marital status. The statute defines the proscribed sexual acts as criminal only if the two people involved are not married to each other. Penal Law § 130.00(2). In People v. Onofre, supra, this distinction as applied to consensual sodomy was declared unconstitutional as a denial of equal protection. Cf. Eisenstadt v. Baird, 405 U.S. 438 (1972), in which no rational basis was found to restrict access to contraceptives based on marital status. As in Onofre, there is no rational basis for the marital status classification in § 240.35(3).

None of the justifications offered by the Petitioner in support of the statute constitutes a rational basis for this distinction. Whatever affront may be caused to members of the public by overhearing sexual solicitations is the same regardless of whether the individuals speaking are married. Additionally, Petitioner's argument that the inherent nature of a marital

(Footnote Continued)

permissibility of the activity is thus conditioned solely on the nature of the message. A statute which imposes content-based restrictions on expression must be strictly scrutinized. Police Dept. of Chicago v. Mosley, 408 U.S. 92, 102 (1972); see also, Widmar v. Vincent, 454 U.S. 263, 276 (1981). "The Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." Carey v. Brown, 447 U.S. 455, 461-62 (1980).

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(Footnote Continued)
relationship precludes public solicitation for sexual activity is unsupported. Pet. Brief at 29. A marital status distinction is arbitrary, unreasonable and inconsistent with the guarantee of equal protection.

The County Court in the instant case incorrectly ruled that only a rational basis for the statute was constitutionally required, and found such a basis in unspecified "historical and presently existing views shared by many in our society concerning deviate and non-deviate sexual conduct. . ." People v. Uplinger, 449 N.Y.S.2d 916, 921 (County Court, 1982). The court speculated that the legislature may have found solicitation for "deviate" sexual conduct to be "more offensive to the standards of public morality" than solicitation for "non-deviate" sexual conduct. Id. at 921. Petitioner now asks this Court to ratify that justification for the statute, arguing that "such solicitations [are] palpably more obtrusive" and "presumptively more offensive" (Pet. Brief at 27, 28) than

"normal" heterosexual solicitations. This argument, however, is circular. It depends for its support entirely upon an assumed repulsiveness toward gay men and lesbians and toward all oral-genital sexual contact.

Real life instructs that, to the contrary, much of the conduct defined as "deviate" by New York Law is increasingly common and accepted. Oral sex between heterosexuals is practiced by a large proportion, perhaps a majority, of sexually-active adults. P. Blumstein and P. Schwartz, American Couples (1983). Verbal solicitations in public places of such conduct occur in restaurants, on beaches, in parks, on public conveyances -- a variety of locations where unwitting bystanders may overhear a proposition. Such conversations are depicted in popular films and

periodicals. The very words spoken by Uplinger are also uttered in heterosexual relationships. The extreme "offensiveness" on which Petitioner relies as a rationale for this statute is the presumed reaction when the identical sexual suggestion is made between men. Mere prejudice, however, cannot satisfy even a rational basis test, much less the strict scrutiny which is required in the instant case.

A true concern for curtailing uninvited and unwanted solicitations for sexual intimacy would not distinguish between the "deviate" and "non-deviate" categories created by § 240.35(3). Women accosted by heterosexual males with explicit proposals for "normal" intercourse may also be distressed or repelled. Petitioner relies on a "no

harm in asking" rationale for women,[7] contrasted with the criminal liability imposed in § 240.35(3) to insure that no male should ever be approached sexually. This reliance embodies a stereotype in the law that all women are appropriately subject to sexual propositions, while men must be shielded from any suggestion of receptiveness to another male's advance. Such gender-based stereotypes cannot be enforced by the state. Mississippi University for Women v. Hogan, 102 S.Ct. 3331 (1982); Orr v. Orr, 440 U.S. 268 (1979); Stanton v. Stanton, 421 U.S. 7 (1975). It is no more difficult for a male than a female

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7. "...[T]he mere solicitation of illicit intercourse from a woman is quite uniformly held not to amount to an assault. (citations omitted)" Prosser, Law of Torts 40 at n.20 (4th ed. 1971).

to speak the word "no." Nor is it any more offensive for males to be given the responsibility for refusing another's advance. When New York City Police stopped using decoys in 1966 to enforce the homosexual solicitation law, "arrests . . . dropped from more than a hundred a week to almost none, but no outraged crowds appeared in precinct headquarters complaining about homosexual propositions." A. Karlen, Sexuality and Homosexuality, 610 (1971). Accord, Project Report, supra at 698 n.83.

The state does have a compelling interest in insuring that all sexual relations are mutually consented to,[8] non-violent[9] and untainted by a

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8. See, e.g., New York Penal Law § 130.05 (lack of consent is element of sex offenses).

(Footnote Continued)

coercive imbalance of power between the parties.[10] The most civilized and least obtrusive means of ascertaining whether another human consents or refuses is the spoken word. In the case at hand, Uplinger relied on another person's ability to simply say yes or no to his invitation. Their conversation violated none of the legitimate state concerns for preventing verbal or physical harassment of a sexual nature.

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(Footnote Continued)

9. An exhaustive examination of the individual and collective social harm generated by sexual violence can be found in S. Brownmiller, Against Our Will: Men, Women and Rape (1975).

10. See, e.g., Michael M. v. Superior Court, 450 U.S. 464 (1981) (upholding statutory rape law as to females of certain ages); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) and Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) (recognizing the right of action where employee is coerced to accept sexual invitation or suffer adverse job consequences, based upon Title VII of the Civil Rights Act of 1964).

The criminalization of solicitations only for "deviate" acts by the state legislature serves no purpose other than the harassment of homosexuals. No greater protection of public safety results. Penal Law § 240.35(3) discriminates without justification against a class of persons defined by their choice of sexual expression, and thus violates the Equal Protection Clause of the Fourteenth Amendment.

## CONCLUSION

For the foregoing reasons, the judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
132 West 43rd Street
New York, New York
(212) 944-9488

By: Mary C. Dunlap
Nan D. Hunter
Abby R. Rubenfeld
(Counsel of Record)

December 17, 1983

## CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of the Rules of the Supreme Court of the United States, the undersigned member of the Bar of the Supreme Court of the United States hereby certifies that three (3) copies of the preceding Motion for Leave to File Amicus Curiae Brief and Brief of Lambda Legal Defense & Education Fund, Inc. on Behalf of Respondent Uplinger were mailed on December 17, 1983, at the U.S. Post Office in New York City, with first-class postage prepaid, to counsel of record for all parties at the addresses listed below, as required by Rule 28.3 of the Rules of the Supreme Court.

Richard J. Arcara, Esq.
District Attorney of Erie County
200 Erie County Hall
25 Delaware Avenue
Buffalo, N.Y. 14202
Counsel for Petitioner

Rose H. Sconiers, Esq.
The Legal Aid Bureau of Buffalo, Inc.
Convention Tower
43 Court Street
Buffalo, N.Y. 14202
Counsel for Respondent Butler

William H. Gardner, Esq.
Hodgson, Russ, Andrews,
Woods & Goodyear
1800 M&T Plaza
Buffalo, N.Y. 14203
Counsel for Respondent
Uplinger

Dated this 17th day of December, 1983

Abby R. Rubenfeld.

Abby R. Rubenfeld, Esq.
(Counsel of Record)
Managing Attorney
Lambda Legal Defense & Education
Fund, Inc.
132 West 43rd Street
New York, New York 10036
(212) 944-9488